Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JESSE WEBSTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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32 PP

QUESTION PRESENTED

1. In *Napue v. Illinois*, 360 U.S. 264 (1959), the Court held that the failure by the government to correct false witness testimony regarding promises of consideration rose to the level of a Fourteenth Amendment Due Process Clause violation. In *Giglio v. United States*, 405 U.S. 150 (1972), the Court held that the government's failure to disclose an alleged promise not to prosecute rose to the level of a Fifth Amendment Due Process Clause violation. The question presented in this case is whether the Court of Appeals for the Seventh Circuit erred in creating a *Napue-Giglio* Due Process Clause exception for government prosecutors who significantly mislead trial jurors by failing to correct false testimony regarding government sentencing recommendations and the sentencing expectations for its principal witnesses?

PARTIES TO THE PROCEEDINGS

On September 7, 1995, Jesse Webster, petitioner, was charged by the Special March 1995 Federal Grand Jury, in Chicago, Illinois, with federal drug and Internal Revenue violations (21 U.S.C. §§ 841(a)(1), 846 and 26 U.S.C. § 7206(1)). Additional co-indictees entered into plea agreements and testified for the government. Petitioner was the only appellant in the case below, *United States v. Webster*, U.S.C.A. 7 No. 97-2729 (7th Cir. 1998) (unpublished order pursuant to Seventh Circuit Rule 53; App. 1a-5a, *infra*).

The United States is the plaintiff-appellee/respondent in these proceedings.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 14

APPENDIX ..... *infra*

TABLE OF AUTHORITIES

Cases	PAGE(S)
Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995)	12
Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963)	10
Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997)	13
Clemmons v. DeLeo, 124 F.3d 944 (8th Cir. 1997)	12
DeMarco v. United States, 415 U.S. 450, 94 S.Ct. 1185 (1974)	10
Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972)	9, 10, 11, 13
Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555 (1995)	11, 12, 13
Manko v. United States, 87 F.3d 50 (2nd Cir. 1996)	12
Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959)	6-10, 13
Ring v. United States, 419 U.S. 18 (1974)	10
United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985)	12

United States v. Lloyd, 71 F.3d 408 (DC Cir. 1995) 13

United States v. Pelullo, 105 F.3d 117 (3rd Cir. 1997) 12

United States v. Smith, 77 F.3d 511 (DC Cir. 1996) 12

Constitution and Statutes

U.S. Constitution: Fifth Amendment 1

18 U.S.C. § 3231 1

21 U.S.C. § 841(a)(1) 2

21 U.S.C. § 846 2

26 U.S.C. § 7206(1) 2

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 2254 . . . . . *passim*

Jesse Webster (Webster), petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINION BELOW

The unreported order of the court of appeals is reproduced as App. 1a-5a, *infra*.

JURISDICTION

The jurisdiction of the district court was based on 18 U.S.C. § 3231. The United States Court of Appeals for the Seventh Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291. That court issued its decision on June 8, 1998. Webster did not seek rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall . . . [nor] be deprived of life, liberty or property, without due process of law . . . .

STATEMENT

1. In late February 1995, a United States Magistrate in Chicago, issued a federal arrest warrant charging Webster with drug-related offenses. Webster, age 28 and a resident of Chicago, Illinois, surrendered to federal

authorities on or about March 5, 1995. Webster was represented by retained counsel and denied release pending trial.

On September 7, 1995, a multi-count superseding federal indictment charged Webster, Sam Lee Mitchell (Mitchell) and Archie West (West) with conspiring to distribute kilo quantities of drugs in the Chicago area from approximately 1992 to late 1994 (count one; R. 45). Count two charged Webster, West and Mitchell with possessing approximately fifteen kilos of cocaine, in Chicago, in early August 1994 (R. 45, pg. 4). Count three charged Webster, Mitchell and West with attempting to purchase twenty-five kilos of cocaine on August 10, 1994 (R. 45, pg. 5). Counts one and three charged conspiracy and attempt under 21 U.S.C. § 846; count two charged possession with intent to distribute pursuant to 21 U.S.C. § 841(a)(1). Webster was charged in counts four and five with federal tax violations for the years 1993 and 1994 in violation of 26 U.S.C. § 7206(1).

Messrs. Mitchell and West entered into plea agreements and, along with Reginald Jones (a separately indicted co-conspirator), testified as government witnesses.

2. Webster's jury trial commenced in the U.S. District Court, Chicago, Illinois, on November 15, 1995, and culminated with the return of split-verdicts on November 30, 1995 (R. 56, 63) (Webster was convicted on the dual drug conspiracy and tax counts, but acquitted on the substantive fifteen kilo early August 1994, charged in count two).

a) Mitchell testified that he was a broker or "middleman" in drug deals for several years prior to November 1995 (Tr. 748-749). Mitchell's home, in Dalton, Illinois,

was raided by DEA agents in November 1994. The agents seized drugs, two weapons and approximately $20,000 in USC. Once detained, Mitchell admitted to being a dope dealer; he was not arrested and "kept right on selling dope" (Tr. 813-816). He was later arrested on February 27, 1995, and ultimately pled guilty (Tr. 753-754, 816). His plea agreement called for a U.S.S.G. sentencing range of 135-168 months but, with a downward departure he could receive 67 months or less (Tr. 753-754, 797). Mitchell committed perjury during Webster's trial. During summation, the government addressed Webster's lies and future sentencing, thusly:

> Sam Mitchell lied on cross-examination, ladies and gentlemen, when he was asked questions about his personal wealth and his personal circumstances. And I am going to ask you to think about that and I'm going to ask you to think about a couple of things in that regard. First of all, don't worry, Judge Zagel will sentence him. Judge Zagel was here for that. He saw what happened. Sentence will be imposed down the line, and the range is up to 168 months. (Tr. 991-992)

On June 6, 1997, Mitchell was sentenced to 54 months in custody (Docket Sheet in appeal No. 97-2978, pg. 20, R. 120).

b) Reginald Jones, the principal prosecution witness, testified that he had been selling cocaine in the Chicago area since about 1987. By 1994, he was peddling approximately forty kilos of cocaine a month prior to his August 1994 arrest (Tr. 535, 624-626). When arrested, Jones was taking delivery of ten kilos of cocaine (Tr. 541). Jones entered into a cooperation agreement which included a U.S.S.G. sentencing range of 210-260 months,

with a downward departure to 105 months (Tr. 546). His cooperation agreement included his pledge to refrain from selling dope. His agreement notwithstanding, he continued selling cocaine from about October 1994 to at least February 1995. His indiscretions led to a plea agreement *addendum* which recited that the government could seek an increased sentence (Tr. 573-575). In the ensemble, Jones testified that he and Webster completed a fifteen-kilo deal in early August 1994 and planned a twenty-five-kilo deal for August 10, 1994 (Tr. 560-576, 597-610). At the government's behest, Jones taped several of his post-arrest August 1994 conversations with Mitchell and Webster. A segment of Jones' direct testimony before Webster's trial jury includes the following:

> Q Now, do you have an understanding of what the United States has agreed to do if you provide truthful information and truthful testimony?
> A Yes.
> Q What's your understanding?
> A That they will make a motion to—they will make a motion.
> Q And what judge would the motion be made in front of?
> A Marovich.
> Q And based on this truthful testimony, if this motion is made, could that result in a lesser sentence for you?
> A Yes.
> Q I would like to talk about what your understanding is of what your sentencing guideline range would have been if you decided not to cooperate with the United States.
>
> Tell the members of the jury what range would have been the minimum and the maximum for the judge under the guidelines as you understand them.

A It would have been 210 months to 260 months and credit.
Q And if a motion is made for a downward departure based on truthful testimony, what's your understanding of what the range would change to if the judge would grant that motion?
A To 105 months.
Q Who is it that decides what your sentence will be?
A The Judge.
Q *Is the government going to make any recommendation at all as to whether or not you should get a low or a high sentence?*
A *No.* (Tr. 545-546; emph. added).

Mr. Jones was sentenced in the U.S. District Court, Chicago, Illinois, on August 25, 1997. The sentencing colloquy included the following recommendation by the same government attorney who had prosecuted Webster:

> On the other hand, his cooperation was more significant than the 54-month folks. Much more significant because it went beyond that particular case. *And so if I were recommending, Judge, I would recommend a sentence in the 40's, because it's lower than the 54 months and it should be. And if he hadn't misbehaved to the extent that he did, I think I would be recommending something even lower than that.* But I have never had a cooperator who has been so helpful with corroborated testimony from tapes and from drug seizures and from money seizures as Reginald Jones. *And so if I were in your shoes, Judge, I would sentence him to a sentence somewhere in the 40s.*

Prior to the imposition of sentence, the district court noted:

> *I do appreciate the recommendation* from Mr. Crowl [AUSA] and Mr. Meyer's [defense counsel] concurrence.

Sentencing Transcript in *United States v. Reginald Jones*, 95 CR 666, at Tr. 14-16, August 25, 1997 (Marovich, Dist. J.; ital. emph. added).

Reginald Jones was sentenced to 48 months in custody. *Id.* at 16. In juxtaposition, on May 21, 1995, Webster was sentenced to life-in-prison, notwithstanding his lack of any prior criminal history.

3. During the pendency of Webster's direct appeal, the government notified Webster's appellate counsel that testimony given by Reginald Jones as a government witness in a separate trial may have been at variance with testimony given at Webster's trial.

On August 26, 1996, Webster filed his district court Rule 33 motion (R. 106). The *sine qua non* for that motion related to a testimonial conflict involving Jones (in a subsequent federal trial Jones gave conflicting testimony regarding the dates and quantities of his drug sales from November 1994 to the spring of 1995, in violation of his plea/cooperation agreement). The United States Court of Appeals for the Seventh Circuit held Webster's direct appeal in abeyance pending district court resolution. On July 30, 1997, the district court entered a bench ruling denying Rule 33 relief (R. 122). The court of appeals consolidated the direct and Rule 33 appeals. App. 1a-5a, *infra*.

On appeal, Webster challenged his cocaine conspiracy convictions, asserting that the Due Process Clause and *Napue v. Illinois* were controlling, because the government's sentencing allocutions for Messrs. Mitchell and Jones were at odds with government trial representations and summation. The Seventh Circuit affirmed Webster's conviction and life-immurement sentence,

finding, in pertinent part, that if there were no waiver—"the sentences the witnesses received were consistent with their testimony at trial and the prosecutor's statements to the jury." App. 3a, *infra*. The affirming panel declined to consider the pivotal issue, e.g., whether the government's sentencing recommendation for its principal witness, following trial testimony which disclosed no government sentencing recommendation, was in defiance of *Napue v. Illinois*?[1]

REASONS FOR GRANTING THE WRIT

The court of appeals concluded that neither *Napue v. Illinois* nor any of the Court's progeny compelled either conviction vacation or remand for an evidentiary hearing. The decision below finds no support in the controlling decisions of this Court.

In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959), the Court vacated the denial of post-conviction relief finding that the failure to correct false testimony was violative of the Due Process Clause of the Fourteenth Amendment. In *Napue*, the principal prosecution witness testified on redirect examination as follows:

> Q. [by the Assistant State's Attorney] Have I promised you that I would recommend any reduction of sentence to anybody?
> A. You did not.

79 S.Ct. at 1176, n. 2.

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[1] *Sub silentio*, the affirming panel either overlooked or declined to acknowledge that Jones' sentencing, which included the government's sentencing recommendation, took place a month after Webster's Rule 33 motion was denied.

Later events disclosed that the prosecuting attorney had told the witness that ". . . if he would testify against Napue, 'a recommendation of a reduction of his [Hammer's] sentence would be made and, if possible, effectuated.'" *Id.* at 1175.

Chief Justice Warren, for the full Court explained:

> *First*, it is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fail under the Fourteenth Amendment. * * * The same result obtained when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. * * *
>
> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of any ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

79 S.Ct. at 1177 (internal supporting citations in original omitted).

Webster juxtaposes that which was condemned in *Napue* to his trial. On direct examination, Reginald Jones, the principal prosecution witness testified:

> Q Who is it that decides what your sentence will be?
> A The Judge.
> Q *Is the government going to make any recommendation at all as to whether or not you should get a low or a high sentence?*

A *No.* (Tr. 545-546; ital. emph. added).

At Jones' August 25, 1997 district court sentencing, government trial counsel, in contradiction to the representation to Webster's jury, stated:

> *And so if I were recommending, Judge, I would recommend a sentence in the 40's, because it's lower than the 54 months and it should be. And if he hadn't misbehaved to the extent that he did, I think I would be recommending something even lower than that. * * * And so if I were in your shoes, Judge, I would sentence him to a sentence somewhere in the 40s.*

Sentencing Transcript in *United States v. Reginald Jones*, 95 CR 666, at Tr. 14 (Marovich, Dist. J.; ital. emph. added).

Napue was cited with approval in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 766 (1972) (Burger, Ch. J.). In *Giglio*, the Court granted certiorari to determine whether non-disclosed evidence regarding the promise not to prosecute a government witness ". . . was such as to require a new trial under the due process criteria of *Napue v. Illinois* and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963)," 450 U.S. at 151. Giglio's direct appeal was pending when his counsel learned that the government's witness, Taliento, who denied any "non-prosecution" deal at trial, had a non-prosecution promise. *Id.* at 152-153. The government's summation included a jury representation that Taliento "received no promises that he would not be indicted." *Id.* During district court proceedings based on the newly discovered evidence, an affidavit from an Assistant U.S. Attorney revealed a non-prosecution promise. Another AUSA affidavit was to the contrary. The district court declined

relief. While remanding for a new trial and reviewing settled precedent, Chief Justice Burger explained:

> As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). In *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed. 2d 1217 (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.*, at 269, 79 S.Ct., at 1177. Thereafter *Brady v. Maryland*, 373 U.S., at 87, 83 S.Ct., at 1197, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." * * * When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. * * * A finding of materiality of the evidence is required under *Brady, supra*, at 87, 83 S.Ct., at 1196, 10 L.Ed. 2d 215. A new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . ." *Napue, supra*, at 271, 79 S.Ct., at 1178.[2]

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[2] In *DeMarco v. United States*, 415 U.S. 450, 94 S.Ct. 1185 (1974) (Per Curiam), the Court granted certiorari and vacated a Seventh Circuit conviction affirmation with directions that the case be remanded to the district court for an evidentiary hearing. Citing *Napue* and *Giglio*, the Court held that the question of government dispositional promises, undisclosed, should be the subject of district court exploration. See *Ring v. United States*, 419 U.S. 18, 95 S.Ct. 164 (1974) (Per Curiam) (same).

Giglio's applicability is plain. The "no recommendation" went uncorrected and remains in stark contrast to the government's later sentencing "recommendation" in connection with Reginald Jones. *Giglio* also made note of the government's summation (Taliento received no promises that he would not be indicted).

At bar, Mitchell, a broker of local cocaine deals, committed perjury. The government summation enticed the jury to believe that Mitchell's perjury would be calibrated into his sentence:

> Sam Mitchell lied on cross-examination, ladies and gentlemen, when he was asked questions about his personal wealth and his personal circumstances. And I am going to ask you to think about that and I'm going to ask you to think about a couple of things in that regard. First of all, don't worry, Judge Zagel will sentence him. Judge Zagel was here for that. He saw what happened. Sentence will be imposed down the line, and the range is up to 168 months. (Tr. 991-992)

On June 6, 1997, Mitchell was sentenced to 54 months: the government prosecutor, contrary to his summation, offered nary a word concerning Mitchell's trial "perjury." (App. 7a-11a, *infra*).[3]

In *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995), the Court reviewed the standard for granting § 2254 relief where the materiality of suppressed evidence was considered. In sum, the Court held that a "reasonable probability" of a different result is shown when the government's evidentiary suppression 'under-

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[3] The same AUSA who tried Webster appeared for the government at the Mitchell/Jones sentencings.

mines confidence in the outcome of the trial.'" 115 S.Ct. at 1566 (quoting *United States v. Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381). *Kyles*' holding has been the subject of explanation and exploration in subsequent courts of appeals decisions. For example, in *United States v. Smith*, 77 F.3d 511 (DC Cir. 1996), the court reversed drug related convictions noting that, post-*Kyles*, materiality [of suppressed] information is not gauged by a sufficiency-of-the-evidence test, 77 F.3d at 512, citing *Kyles*. The reversing panel went on to describe the holding in *Kyles*, noting that ". . . a reviewing court must focus on the fairness of the trial the defendant actually received rather than on whether a different result would have occurred had the undisclosed evidence been revealed." The panel, quoting from the Court's opinion in *Kyles*, noted:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

77 F.3d at 514 (citing *Kyles*, 115 S.Ct. at 1566).[4]

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[4] In accord, *Manko v. United States*, 87 F.3d 50, 50-55 (2nd Cir. 1996) (citing *Kyles*, while vacating denial of § 2255 relief); *Banks v. Reynolds*, 54 F.3d 1508, 1517-18 (10th Cir. 1995) (citing *Kyles*, while affirming granting of § 2254 relief); *Clemmons v. DeLeo*, 124 F.3d 944 (8th Cir. 1997) (on rehearing) (granting § 2254 relief citing *Kyles*); *United States v. Pelullo*, 105 F.3d 117, 122 (3rd Cir. 1997) (vacating denial of

(continued...)

The Court's opinion in *Kyles* further notes that if withheld evidence is exculpatory and material under *Brady*, then the prosecution's failure to disclose is harmful as a matter of law: ". . . there is no need for further harmless-error review," 115 S.Ct. at 1566.

Webster contends that he is entitled to conviction vacation either under the "any reasonable likelihood" test enunciated in *Napue* and *Giglio*, or under the more expansive *Kyles*' test, "fairness of the trial . . . undermines confidence in the outcome of the trial." Under either test, the Seventh Circuit's decision is in clear conflict with controlling decisions of the Court as well as recent sister circuits opinions.

The Seventh Circuit's error warrants correction by this Court. The court of appeal's election to disregard controlling Court precedent has culminated in the perpetuation of Webster's life-immurement sentence. The harmful effects of the Seventh Circuit's decision must be corrected lest that court will feel free to continue disregarding settled Court precedent.

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[4] (...continued)
Rule 33/§ 2255, citing *Kyles*); *Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997) (*en banc*) (*Brady* violation warranted § 2254 relief, citing *Kyles, Bagley* and *Giglio*—Material evidence required to be disclosed includes evidence bearing on the credibility of government witnesses); *United States v. Lloyd*, 71 F.3d 408, 410-12 (DC Cir. 1995) (citing *Kyles*, while vacating impacting counts of conviction).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

[UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 53]

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Argued April 22, 1998

Decided June 8, 1998

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

UNITED STATES OF AMERICA,	)
	) Appeals from the
Plaintiff-Appellee,	) United States District
	) Court for the Northern
Nos. 96-1779	) District of Illinois,
97-2978 *vs.*	) Eastern Division.
	)
JESSE WEBSTER, also known	) No. 95 CR 126
as LEE NOBLE, also known as	)
LA NOBLE, also known as	) **James B. Zagel**,
LEE WATTS,	) *Judge.*
	)
Defendant-Appellant.	)

ORDER

In September 1995 a five-count superseding indictment was returned against defendant Jesse Webster and Archie West, Jr. The first three counts of the indictment charged them with various cocaine offenses whereas the final two counts charged Webster with tax fraud

for 1992 and 1993. On September 13, 1995, Webster entered a plea of not guilty to all counts of the indictment. On November 30, 1995, a jury found defendant guilty of Counts I, III, IV and V, and subsequently he was sentenced to life in prison. His motion for a new trial was denied on July 30, 1997, resulting in this appeal.

Facts

From 1992 through early 1995, defendant distributed 200 to 300 kilograms of cocaine. He was assisted by Archie West and four others. In brief, the evidence showed that defendant first met Archie West in 1985, when West began buying cocaine from defendant; the purchases continued until 1988 or 1989 when they had a falling-out. However, the friendship was renewed in early 1992 and West agreed to drive for defendant through early 1995 in connection with cocaine deals. Subsequently West began storing cocaine for defendant and became closely involved with defendant's drug trafficking.

Another co-conspirator, Sam Mitchell, bought cocaine from defendant for his personal use and later began to sell it. He also began working for defendant by finding cocaine purchasers and introduced defendant to co-conspirator Reginald Jones. From 1992 onward, Jones began buying drugs in large quantities from defendant. From 1992 through 1994, Jones bought from and sold to defendant 26 kilograms of cocaine. At trial, West, Jones and Sam Mitchell testified about the cocaine they had purchased from, sold to and helped to distribute for defendant. They testified pursuant to plea agreements. In addition to their testimony, the jury heard tape recordings harmful to defendant.

New trial claim

Defendant argues that he is entitled to a new trial on the ground that the jury was misled into believing that the cooperating witnesses would receive stiffer sentences than they actually received. However, this argument was not raised below and was therefore waived. Even were the argument not waived, the sentences the witnesses received were consistent with their testimony at trial and with the prosecutor's statements to the jury.

An attempt to possess with intent to distribute cocaine is a cognizable federal crime

Defendant next assails Count III of the indictment charging him with knowingly attempting to possess, with intent to distribute, 25 kilograms of cocaine in violation of 21 U.S.C. § 846. 21 U.S.C. §841(a)(1) proscribes possession with intent to distribute a controlled substance. Then 21 U.S.C. § 846 makes it a crime to attempt to violate the foregoing provision. Therefore Count III of the superseding indictment was sufficient.

Court's increase of defendant's base offense by four levels

Under U.S. Sentencing Guidelines § 3B1.1(a) a defendant's offense level can be increased four levels if the court determines that his role was that "of an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive."

Here the trial court found that there were five or more members involved in this criminal activity, namely, defendant, Archie West, Andre Mitchell, Sam Mitchell,

Dino,* Reginald Jones and Sherman Randolph (Webster Sentencing Tr. 12). Judge Zagel noted that defendant led four of the individuals (West, Andre Mitchell, Sam Mitchell and Dino) so that the requisite number five was present. Defendant concedes that West was a participant in the criminal activity (Br. 29, 33), and the evidence established that he had control over at least three others, namely, Andre Mitchell, Sam Mitchell and Dino. Therefore the four-point enhancement was justified.

Quantity of narcotics

The trial judge pointed out that not only had the government proved the 150-kilogram requisite amount but in fact that 288 kilograms were involved. These calculations were supported by West's testimony, which had been corroborated. In this respect the trial Court relied on the August 10, 1994 cocaine deal and the testimony of Reginald Jones. Consequently, defendant's challenge to the drug quantity calculations of the trial court is unjustified.

Failure to decrease defendant's base offense level under U.S.S.G. § 2X1.1(B)(2)

Defendant asserts that Judge Zagel should have reduced his base offense level by three levels with respect to Count III on the ground that the court did not make the necessary factual determination that defendant completed his part in the attempt. This argument was not raised below and therefore can only succeed if the trial

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* Dino's full name does not appear in the briefs.

court committed plain error. *United States v. Wallace*, 32 F.3d 1171, 1174 (7th Cir. 1994). However, Guidelines § 2X1.1(B)(2) does not apply because the defendant was charged in Count III with attempted violation of 21 U.S.C. § 846, which is covered by § 2D1.1 of the Sentencing Guidelines.

Higher standard of proof in determining defendant's base offense level was not required

Citing *United States v. Watts*, 117 S. Ct. 633 (1997), defendant contends that the trial court should have used a higher standard of proof in determining his base offense level. However, Watts involved the question whether acquitted conduct may be calculated in determining a base offence level under § 1B1.3 of the Sentencing Guidelines and does not apply here. We have already determined that there is no heightened standard applicable to conduct which is being added as relevant conduct. *United States v. Evans*, 92 F.3d 540, 545 (7th Cir. 1994), certiorari denied, 117 U.S. 404; *United States v. Bailey*, 97 F.3d 982, 985 (7th Cir. 1996). We are unwilling to reconsider the issue in this case, where the court did not use relevant conduct in reaching the offense level, but rather considered only the crimes of conviction and based its sentence on evidence that had already been introduced at trial.

Conviction and sentence affirmed.

[1]

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	No. 95 CR 126
v.	)	Chicago, Illinois
	)	June 6, 1996
SAMUEL MITCHELL,	)	2:15 p.m.
	)	Sentencing Hearing
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES B. ZAGEL

APPEARANCES:

For the Government:

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For the Defendant:

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Chicago, Illinois 60601

* * * * * *

[2] THE CLERK: 95 CR 126, United States versus Samuel Mitchell.

MR. CROWL: Matthew Crowl on behalf of the United States.

THE PROBATION OFFICER: Joseph Idstein, Probation Office.

MS. MC FERREN: Good afternoon, Your Honor. Libby McFerren. I represent Mr. Mitchell in this matter.

THE DEFENDANT: How are you doing, Your Honor?

THE COURT: Mr. Mitchell. Are we ready to proceed?

MR. CROWL: We are, Judge.

THE COURT: Both sides have seen the presentence report?

MS. MC FERREN: Yes, Your Honor.

MR. CROWL: Yes.

THE COURT: The defendant has read it as well?

MS. MC FERREN: Yes, Your Honor.

THE COURT: Corrections, changes, comments?

MR. CROWL: There was one change, Judge. In the report, the section that says impact of plea agreement, which is the bottom of page 11 and the top of page 12, there was a discussion—and I don't—I see we don't have the exact lines here, Judge, but I can give you the sense of it.

There was a discussion that said the plea agreement [3] binds Your Honor to 50 percent of the low end of the range. And I think that was a misstatement by Mr. Idstein. He caught it as well. It's a free-fall downward departure with a government range 50 percent of the low end range

THE COURT: Right.

MR. CROWL: So it's not an 11E1.C.

THE COURT: Okay. That's fine. Anything else?

MS. MC FERREN: That's it, Judge.

THE COURT: Anyone have anything to say?

MR. CROWL: Yes, Judge.

Your Honor sat through the trial of Mr. Webster and you heard Mr. Mitchell testify. There's some other matters that I would like to bring to Your Honor's attention.

He was the first person to cooperate in this case. And as Your Honor can recall this really was an investigation because Mr. Webster was arrested without cocaine. We needed witnesses in that case to flesh out the extent of the conspiracy. We knew that he was a major supplier of drugs, including to the Gangster Disciples, which didn't come out during Your Honor's trial. And Mr. Mitchell was the first person who had agreed to cooperate.

And granted, we had done a search warrant and we had some information on him as well and knew that he was involved in drugs, but, nonetheless, as Your Honor knows it's not an [4] easy decision on a major drug dealer who also happened to be one of the personal friends of the defendant, Jesse Webster, for him to choose to testify truthfully at trial.

He did that, and it was in part his cooperation in the case that made that that then allowed us to get the cooperation of Archie West, who Your Honor has already sentenced to 54 months and Your Honor recalls that sentencing several months—actually close to a year ago now.

But I just wanted to put that in context because although in the testimony at the trial Mr. West provided more extensive knowledge of the defendant's drug dealings, Mr. Webster's drug dealings, because he was the chauffeur, the taxi driver who later became the runner, it was Mr. Mitchell based on the tape-recorded conversations who really started the ball rolling on that front.

Another thing which is important for the government, Judge, is while Mr. West testified in that particular

case, Mr. Mitchell has done that in Jesse Webster's case and also has given us information on six other individuals, one of whom, ironically, is Reggie Jones, who was one of the flippers in Your Honor's case as well. He was out selling dope on the street, as Your Honor can recall, while he was working as a CI.

THE COURT: I recall.

MR. CROWL: And Mr. Mitchell was the one who actually did the deal on him, so that we were able to find that, which [5] is important because we don't want our CIs out there selling drugs at the same time.

He also provided information regarding another person supplying drugs to the GDs, another individual who was a Gangster Disciple dealing with two to five kilogram quantities of cocaine—he gave us information about that—a north side drug supplier who dealt up to five kilos of cocaine; another drug supplier from another district who is being pursued there who was providing 10 kilograms of cocaine per week; and most recently since Your Honor allowed him to stay out and cooperate with the DEA, he provided some helpful information on a heroin dealer that has resulted in some investigation, but not an indictment yet.

That is information, obviously, that we wanted to let Your Honor know about because that has been significant help for the government.

We had agreed, as you can see in the plea agreement, to a recommendation of 50 percent of the low end of the range. I just wanted to throw two more bits of information to Your Honor in terms of where Your Honor ultimately decides to sentence Mr. Mitchell.

One of those is the irony, but the appropriateness, of the two-level gun enhancement. We certainly agree that the two-level gun enhancement is appropriate because Mr. Mitchell mentioned and testified about the gun that he got the defendant [6] to purchase for him or that he

arranged for the purchase of with the defendant. And that gun enhancement involves the conspiracy and basically gives him two additional levels.

Factually that's correct and the guidelines should do that to him. As Your Honor knows, the Irony of that is that's information that we get only from him. We never recovered any guns in this case. During the course of trial preparation he a mentioned that.

Yes, that hurts him in terms of his ultimate guideline range, and it actually does kind of double damage to him because otherwise, as Mr. Idstein mentions in his report, he would have gotten the two levels off under that safety valve provision, but because he mentioned to us the gun, which was required to do when he testifies truthfully, that gives up a four level spread, gives him four additional points.

Had that not been the case, had he done what I imagine other people do, had he not testified truthfully about that gun, he would have been at the same range that Mr. West was. He would have been four levels lower than he is now. He would have been a level 31 instead of a level 35 for a range of 108 to 135 months.

And you recall Mr. West got 54 months, which was half of the low end of that range.

I'm not arguing, Judge, that we're backing off of our agreement. We agreed that we would recommend 50 percent of the [7] low end of whatever the resulting guideline range is, which in this case is 165 to 210 months.

So our recommendation is 84 months, but obviously Your Honor is free to weigh any equity you wish, and I think that an additional four levels is an equity which you would want to know about and I'm sure you do, Judge.

* * * *

[8-9] THE COURT: The government having moved for downward departure, I grant the government's motion for downward departure. I agree with Mr. Crowl on the gun. 54-months in custody, five years supervised release.